Condemned if They Do, Condemned if They Don't: Eminent Domain, Public Use Abandonment, and the Need for Condemnee Protections

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I. INTRODUCTION

Imagine you are enjoying the tranquility of your home and its surroundings when you receive a notice in the mail that the local power company wants to condemn your home in order to build a new power plant.[1] Determined to put up a fight in hopes of the power company backing down, you decide to contest the taking in court. During trial, the power company adduces a few drawings of the proposed power plant, along with financial reports showing that the power company will likely be able to complete the project in the coming years. Surely, you think, the power company must produce something other than a few drawings and reports before it can condemn your property. However, the court rules in favor of the power company, and you are forced to leave your home.

Six months later, you read about a major real estate development plan in the newspaper involving new housing subdivisions and strip malls. As you read the article more carefully, you realize the proposed site of this new development is exactly where your old house used to stand, before the power company demolished it. Furious, you call your lawyer and demand he file a complaint to get your property back, as the power company appeared to have no intention of building a power plant

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1. This hypothetical is based on a pending case, *O'Neal v. Indianapolis Power & Light Co.* Class Action, Wrongful Taking of Real and Personal Property, Demand for Jury Trial, O'Neal v. Indianapolis Power & Light Co., NO. 55DO1-0409-PL-561 (Ind. Super. Ct. Sept. 7, 2004), *available at* http://richardnboe.com/classaction.htm.

in the first place. Giving up your home for a project that benefits everyone is tolerable, but losing your home so others can make a profit is unacceptable, you tell him. Sadly, your attorney informs you that you have no cause of action against the power company. Because the court determined that the taking was for a "public use," the power company can do whatever it wants with the property. The company has no obligation to put the property to a use that will benefit the public as a whole, despite having been required by the court to show a public use warranting the exercise of eminent domain.

Although such a scenario may be hard to imagine, it is possible based on current eminent domain jurisprudence. By allowing a condemnor to abandon the public use after condemnation, courts have expanded condemnors' power while simultaneously limiting condemnees' ability to protect themselves from fraudulent and speculative takings. Once a condemnor can prove a prima facie public use for the property, the condemnee has virtually no way to prevent the condemnation, nor can the condemnee regain title to the property if the public use is abandoned. This result is inequitable because it allows condemnors to unfairly manipulate the doctrine of eminent domain for their own personal gain, rather than for the benefit of the public.

Courts that allow condemnors to abandon the public use of the property after condemnation through eminent domain, without providing any corresponding substantive or procedural rights for condemnees, ignore the public use requirements of the U.S. and Washington constitutions. To level the field between condemnor and condemnee rights, four changes should occur. First, courts should stop presuming condemnors act in good faith when bringing condemnation proceedings. Second, courts should decide whether the property at issue is necessary for the project, as well as whether the type of interest sought is necessary, instead of deferring to legislative determinations regarding these issues. Third, condemnors should be required to put the property to a public use within a reasonable period of time and should continue that use for a specified period. Finally, condemnees should have the right to repurchase the property at the original condemnation price if the public use does not occur within a reasonable period of time or if the condemnor fails to satisfy the statutory period of public use.

This Comment is divided into six parts. Part II examines the historical and constitutional understandings and application of eminent domain and the public use requirement. Part III analyzes cases decided under the U.S. and Washington constitutions in which courts upheld condemnors' rights to abandon or fail to fulfill the public use of the condemned property. Part IV discusses cases outside of Washington in

which courts have upheld the validity of takings even though the condemnor subsequently abandoned or failed to fulfill the public use. These cases illustrate the need for more substantive and procedural protections for condemnees. Part V argues that allowing condemnors to abandon the public use is inconsistent with the public use requirement of the federal and Washington constitutions. This Part also examines possible procedural and substantive protections to protect condmnees from arbitrary or speculative takings and recommends that the legislature enact some, but not all, of these protections.

II. HISTORICAL UNDERSTANDINGS OF EMINENT DOMAIN AND PUBLIC USE UNDER THE U.S. AND WASHINGTON CONSTITUTIONS

Eminent domain is the power of states, cities, and other authorized entities, such as power companies, to condemn private property for a public use.[2] The Fifth Amendment guarantees, among other things, that private property can only be taken for a public use and only when just compensation is paid.[3] This portion of the Amendment, known as the Takings Clause, ensures that select individuals are not forced to bear the burden of public projects that should be borne by the entire public.[4] The Washington constitution has a similar provision,[5] although its precise boundaries differ in important ways from the Fifth Amendment.[6] This Part examines the historical development of the public use requirement

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2. Manufactured Hous. Cmtys. of Wash. v. State, 142 Wash. 2d 347, 369, 13 P.3d 183, 194 (2000) (citing BLACK'S LAW DICTIONARY 523 (6th ed. 1990)).

3. U.S. CONST. amend. V.

4. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960).

5. *See* WASH. CONST. art. I, §16 (amended 1920). The eminent domain provision of the Washington constitution states,

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be apportioned to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided*, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

Id.

6. *See infra* Part II.C.1.

under both the Fifth Amendment of the U.S. Constitution[7] and article I, § 16 of the Washington constitution.[8]

A. Historical Influences on and Understandings of Public Use Under the Fifth Amendment of the U.S. Constitution

Governments have exercised the power of eminent domain for centuries, long before the U.S. Constitution included the Takings Clause;[9] however, scholars disagree as to where the power of eminent domain originated.[10] Most scholars believe that eminent domain is an inherent power of sovereignty.[11] As such, the Takings Clause limits the government's eminent domain power, rather than granting the government eminent domain power. In other words, because the government as a sovereign entity necessarily possesses the power of eminent domain,[12] the Fifth Amendment merely limits that power to takings for a public use and requires that when the power is exercised, the government pay the owner just compensation.[13]

Determining exactly what the framers intended by the Takings Clause is difficult. Although the text of the Takings Clause is seemingly clear, there are little or no records of debate about the clause.[14] Moreover, there is disagreement among scholars as to which political ideologies likely influenced the framers' understandings of eminent domain.

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7. U.S. CONST. amend. V.

8. WASH. CONST. art. I, §16 (amended 1920).

9. HENRY E. MILLS, A TREATISE UPON THE LAW OF EMINENT DOMAIN 2 (1879).

10. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 557–58 (1972). A handful of early cases advocated for a "reserved power theory," meaning that the government holds an inherent exception in the title of all property that it can exercise whenever it chooses. *Id.* at 557 (citing, as examples, Donnaher v. State, 16 Miss. 649 (8 S. & M. 649) (1847); Cushman v. Smith, 34 Me. 247, 259–60 (1852)). However, this theory is problematic as a basis for eminent domain in the United States because the theory would not require compensation of any kind. Instead, the government could simply exercise the right it already has in the title to the property. *See* Stoebuck, *supra*, at 558. Because the theory is problematic, most commentators look to other theories to explain eminent domain in the United States. *See id.* at 559.

11. Stoebuck, *supra* note 10, at 559 (citing 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 339 (2nd ed. New York, Halsted (1832))); Robert Kratovil & Frank J. Harrison, Jr., *Eminent Domain—Policy and Concept*, 42 CAL. L. REV. 596, 596 (1954)). *See also* 1 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN §1.11, at 1-7 to 1-9 (rev. 3d ed. 1997). The Supreme Court took a similar position in *Kohl v. United States*, stating that the government has the power of eminent domain because "such an authority is essential to its independent existence and perpetuity." 91 U.S. 367, 371 (1875).

12. *See* Stoebuck, *supra* note 10, at 560. As Stoebuck notes, it is not true that the power of eminent domain is *necessary* for the government to remain sovereign. *Id.* Government could still function, albeit not as effectively, even if it did not have the power of eminent domain. *Id.*

13. U.S. CONST. amend. V.

14. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995). While ratifying the Constitution, the states suggested amendments for every provision in the Bill of Rights except the Takings Clause. *Id.*

Some scholars believe that republicanism was the dominant influence on the framers' understanding of property.[15] Classic republicanism advocated the importance of private property, particularly land, as the prerequisite to participation in civic affairs.[16] Classic republicans thought that only private property owners were independent enough to make rational judgments and not be swayed by others in their decision-making.[17] Classic republicans also believed that the legislature promoted the "public good," which was thought to include everyone's interests.[18] Thus, under classic republicanism, it was not problematic in terms of individual rights when the government exercised eminent domain because the government, by definition, worked to promote the public good.[19] Even if private property was taken by the government, the property would have to be put to a use that promoted the public good.[20] Consequently, the property owner still benefited, even if his or her property was taken.

Conversely, some scholars believe that John Locke was the primary influence on the framers' understanding of property rights, and thus eminent domain.[21] Locke argued that government was created, in part, to protect property, and this protection was the reason individuals chose to leave the state of nature and enter into society.[22] Locke argued that government could not take property without the owner's consent because if government could do so the property owner would lose the only reason for entering into society in the first place, namely the protection of property.[23] James Madison[24] was particularly influenced by Locke when he wrote, "Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[25]

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15. Nathan Alexander Sales, Note, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 DUKE L.J. 339, 342 (1999).

16. *Id.* at 355.

17. *Id.* (citing FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 74 (1985); Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 298 (1991); Treanor, *supra* note 14, at 821).

18. Sales, *supra* note 15, at 358.

19. *Id.*

20. *Id.*

21. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 16, 29 (1985); Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 54–55 (1998).

22. JOHN LOCKE, LOCKE'S SECOND TREATISE OF CIVIL GOVERNMENT 56 (Lester DeKoster ed., abr., William B. Eerdmans Publishing Company 1978) (1690).

23. *Id.* at 62.

24. James Madison was one of the leading contributors to the U.S. Constitution and was President of the United States from 1809–17. GARRY WILLS, JAMES MADISON 1, 57, 119 (2002).

25. Kochan, *supra* note 21, at 55 (citing James Madison, *Property*, NATIONAL GAZETTE (Mar. 27, 1792), *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert Rutland et al. eds., 1983) (emphasis in original)).

Regardless of which theory actually influenced the framers' understanding of eminent domain and the role of government in protecting property, the Takings Clause's public use requirement remains intact. Under republicanism, government can only work to promote the public good.[26] Thus, when it exercises eminent domain, the government necessarily puts the property to a use that will be in the public's interest.[27] If a project is in the public's interest, it would likely satisfy the public use requirement as currently formulated by the courts.[28] In contrast, under the Lockean tradition, private property must be protected from government interference; therefore, eminent domain is *only* allowed when the property will be put to a public use, since the property owner will still in some sense benefit from the property.[29] Nonetheless, under either the Lockean or republican formulation of eminent domain, public use remains a necessary component.

In addition to the influences of Locke and classic republicanism, the framers may have included a public use requirement in recognition of the idea that real estate, and more specifically one's home, is something that cannot always be adequately compensated monetarily. For many people, property is their "foundation for 'self-determination and self-expression.'"[30] Additionally, property can be viewed as indistinguishable from liberty.[31] As one scholar notes, "'[d]isplacement from one's home, however mitigated by compensation, effectively defeats' a person's autonomy."[32] By restricting the government's exercise of eminent domain to those instances where the public will benefit from the condemnation, the framers likely recognized the importance of private property not only to one's political participation, but also to one's ability to be a complete citizen.

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26. *See supra* text accompanying notes 15–20.

27. *See supra* text accompanying notes 15–20.

28. *See, e.g.*, *infra* text accompanying notes 35–48.

29. *See supra* text accompanying notes 21–25.

30. Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 216 (2004) (quoting Frank I. Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 HARV. C.R.-C.L. L. REV. 296, 298–99 (1980)).

31. *Id.* at 216 (citing Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982)).

32. *Id.* (quoting Laura Mansnerus, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 431 (1983)).

B. Judicial Interpretations of the Public Use Requirement Under the Fifth Amendment

Although public use is a seemingly narrow term,[33] there are two primary ways courts could interpret the public use requirement.[34] A court could interpret the clause literally and hold that the public must actually be able to use the property in order to satisfy the public use requirement. In early decisions, a few courts adopted this literal approach to public use.[35] Conversely, a court could interpret the clause more broadly and hold that if the condemnation benefits the public in any way, the public use requirement is satisfied.

Since the Supreme Court's 1954 decision in *Berman v. Parker*,[36] courts deciding condemnation actions have adopted the broad view of eminent domain and public use. In *Berman*, Congress passed the District of Columbia Redevelopment Act of 1945 to rid the city of blighted and slum housing, and the city planned to use eminent domain to condemn blighted property and redevelop it.[37] The plaintiffs owned land in an area designated for redevelopment, although the land they owned was not blighted nor was it slum housing; rather, it was a department store in good condition.[38] They challenged the taking, claiming that their property could not legally be condemned since it was in good condition and did not contribute to the dilapidated conditions in the city.[39] The Court rejected the plaintiffs' argument, holding that the city could exercise eminent domain to effectuate the community redevelopment plan, even though plaintiffs' property was not deteriorated.[40] According to the

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33. Kochan, *supra* note 21, at 61. By choosing the phrase "public use," rather than a broader phrase such as "public benefit" or "public interest," the framers intended to limit the power of eminent domain. *Id.*

34. *See* Timothy Dwight Benedict, *The Public Use Requirement in Washington After* State *ex rel.* Washington State Convention and Trade Center v. Evans, 75 WASH. L. REV. 225, 227 (2000); Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1978); Sales, *supra* note 15, at 344 (citing 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.01[5], at 7-20 to 7-21 (rev. 3d ed. 1999); Stoebuck, *supra* note 10, at 591). There is arguably a third way in which a court could interpret the Takings Clause, namely that the Clause requires compensation only when the taking occurs for a public use. Sales, *supra* note 15, at 344; Stoebuck, *supra* note 10, at 591. Thus, it is argued, the Clause says nothing about the government taking property for private uses. *See* Sales, *supra* note 15, at 344; Stoebuck, *supra* note 10, at 591. However, no court has held that the Takings Clause permits takings for purely private purposes.

35. Stoebuck, *supra* note 10, at 589 (citing Bloodgood v. Mohawk & Hudson R.R., 18 Wend. 9, 56–62 (1837) (comments of Senator Tracy)). Under this literal approach, condemnation for economic redevelopment, *see infra* text accompanying notes 43–45, would not be allowed, as the public is not actually able to use all of the property once the condemnation is complete.

36. 348 U.S. 26 (1954).

37. *Id.* at 28.

38. *Id.* at 31.

39. *Id.*

40. *Id.* at 32.

Court, the legislature determined such redevelopment was necessary by passing the Act.[41] Thus, the Court found that it had only a narrow role in determining whether the project was a proper public use.[42]

Recently, the Court reaffirmed its broad interpretation of public use. In *Kelo v. City of New London*, the Court upheld New London's exercise of eminent domain to effectuate a development plan, the purpose of which was to create jobs, increase tax and other revenue, and "revitalize an economically distressed city."[43] Under the plan, any property that fell into the area designated for redevelopment could be condemned, regardless of whether that property was actually blighted.[44] Additionally, private developers would acquire some of the property through long-term leases.[45] The Court rejected the petitioners' claim that the plan did not satisfy the public use requirement of the Fifth Amendment and stated, "For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."[46] Because the city determined such a plan was necessary, and the plan served a "public purpose," the plan satisfied the public use requirement.[47] The Court did not find it problematic that private developers would acquire some of the property because the identity of the developers had not yet been determined. Therefore, petitioners' argument that the condemnation was actually to benefit private parties, and was thus for a private purpose, was unfounded.[48]

Even under the current broad formulation of public use, however, the Court still requires at least a prima facie showing that the taking will in fact benefit the public. The benefit may come in the form of a better planned community,[49] dispersion of land from ownership concentra-

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41. *Id.* at 29.

42. *Id.* at 32. In reality, the Court played no role in determining whether redevelopment of a blighted area was a proper public use, but instead deferred to the legislature. The Court stated, "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . ." *Id.* The exercise of eminent domain to effectuate an urban renewal plan is at odds with the nineteenth century view of public use, which considered the use of eminent domain for urban renewal to be illegal. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 660 (5th ed. 1883).

43. 545 U.S. 469, 125 S. Ct. 2655, 2658 (2005).

44. *Id.* at 2660.

45. *Id.* at 2662 n.6.

46. *Id.* at 2664.

47. *Id.* at 2665.

48. *Id.* at 2662 n.6.

49. *See supra* text accompanying notes 36–41.

tion,[50] or an urban renewal plan,[51] all of which are quite different than the uses of eminent domain at the time the Takings Clause was ratified.[52] However, the public use must be shown nonetheless. Additionally, the Court still seems to support the notion that takings cannot occur for the sole purpose of transferring ownership of property from *A* to *B*, even if *B* would put the property to a more economically beneficial use than *A*.[53]

C. Judicial Interpretations of Eminent Domain in Washington

Overall, Washington has provided more property protection in its constitution and case law than has been provided under the U.S. Constitution.[54] Part of this difference stems from the textual differences between the Washington and U.S. Constitutions, but those differences alone do not explain the disparity.

Washington courts have adopted six non-exclusive factors, commonly referred to as the *Gunwall* factors, that a court should analyze when determining whether the Washington constitution provides more rights to its citizens in a particular area than the Federal Constitution.[55] These factors include an examination of the following: (1) the state constitutional text; (2) the textual differences between the state and federal provisions at issue; (3) Washington constitutional and common law history; (4) preexisting state law; (5) structural differences between the state and federal constitutions; and (6) whether the clause at issue addresses "matters of particular state or local concern."[56] This section discusses the *Gunwall* factors as applied to the eminent domain provisions of the Washington constitution and illustrates that Washington courts have historically provided more property protection under the state constitution than other courts have provided under the U.S. Constitution.

1. Factors One, Two, and Five: Textual Comparison of the Washington and U.S. Constitutions

The first, second, and fifth *Gunwall* factors together require a comparison of the text of the Washington constitution with that of the Fifth

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50. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241–242 (1984) (upholding a Hawaii statute that allowed the state to condemn private property from owners who owned large percentages of the land in order to disperse ownership among a great number of citizens).

51. *See supra* text accompanying notes 43–48.

52. *See* Berger, *supra* note 34, at 205. The most common uses for eminent domain shortly after the Constitution's ratification were road building and milldams. *Id.*

53. *See* Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655, 2661 (2005).

54. *Compare supra* text accompanying notes 36–48, *with infra* text accompanying notes 57–112.

55. State v. Gunwall, 106 Wash. 2d 54, 58, 720 P.2d 808, 811 (1986).

56. *Id.*, 720 P.2d at 811.

Amendment.[57] The text of the eminent domain section of the Washington constitution is markedly different from that of the Takings Clause. Where the latter simply states, "nor shall private property be taken for public use, without just compensation,"[58] article I, § 16 of Washington's constitution states:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made . . . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided*, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.[59]

While this formulation of eminent domain is much longer and more detailed than its federal counterpart,[60] judges in Washington actually have more discretion when determining what is and is not a public use than judges deciding cases under the Takings Clause.[61] In Washington, public use is a judicial determination.[62] While under the Fifth Amendment courts defer to legislative judgments of public use,[63] the Washington constitution explicitly provides for public use in Washington to be a judicial determination. Additionally, while the U.S. Constitution grants enumerated powers to the federal government, the Washington constitution restrains the "otherwise plenary powers of the state government."[64]

Another difference between the two documents is that the Washington constitution *explicitly* prohibits taking property for private uses.[65]

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57. *See supra* text accompanying note 56.

58. U.S. CONST. amend. V.

59. WASH. CONST. art. I, §16 (amended 1920).

60. *Compare* U.S. CONST. amend. V, *with* WASH. CONST. art. I, §16 (amended 1920).

61. *Compare* WASH. CONST. art. I, §16 (amended 1920) (giving judges the power to determine which projects constitute a public use), *with* Berman v. Parker, 348 U.S. 26 (1954). However, judges in Washington also give deference to legislative determinations of public use, although the extent of that deference has varied over time. *See infra* text accompanying notes 83–104.

62. WASH. CONST. art. I, §16 (amended 1920).

63. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655, 2664–65 (2005) ("Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference.").

64. Manufactured Hous. Cmtys. of Wash. v. State, 142 Wash. 2d 347, 360, 13 P.3d 183, 189–90 (2000).

65. *Id.* at 357–58, 13 P.3d at 188.

Although courts deciding Takings Clause cases have consistently held that condemnors cannot exercise eminent domain for private purposes,[66] the explicit prohibition against takings for private purposes in the Washington constitution provides a further layer of protection for condemnees not found in the text of the Fifth Amendment.[67]

2. Factor Three: Washington Constitutional and Common Law History

Determining the framers' intent regarding the Washington constitution, particularly article I, § 16, is difficult. Washington ratified its constitution in 1889,[68] before the Federal Bill of Rights applied to the states.[69] Generally, little historical information exists regarding the Washington constitution, which makes it difficult to determine the intent of the framers when courts interpret the Washington constitution.[70] Additionally, there was particularly little debate about the eminent domain section of the constitution, so the few records that do exist are of little help.[71] Of the little information available, it is known that two efforts to eliminate the power to take property for private ways of necessity were easily defeated.[72] Also, several delegates to the Washington constitutional convention "were strongly opposed to various exceptions to the absolute prohibition against taking private property for private use."[73] However, these events shed little light on what the framers meant by the term "public use." At best, these events tell us only that the framers did not want condemnors to exercise eminent domain for purely private purposes, yet there should be instances in which condemnors can exercise eminent domain when the proposed use will not be entirely public. The precise boundaries of what constitutes a "public use," however, remain unclear.

The social and political context in which the Washington framers wrote their constitution is quite different from that in which the framers

66. *See supra* text accompanying notes 49–53.

67. *Manufactured Hous. Cmtys. of Wash.*, 142 Wash. 2d at 357–58, 13 P.3d at 188.

68. James M. Dolliver, *Condemnation, Credit, and Corporations in Washington: 100 Years of Judicial Decisions—Have the Framers' Views Been Followed?*, 12 U. PUGET SOUND L. REV. 163, 163 (1989). The Washington constitution was drafted on August 22, 1889, and was ratified on October 1, 1889. *Id.*

69. ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 3 (2002).

70. *Id.* at 1.

71. Dolliver, *supra* note 68, at 171.

72. *Id.* at 172 (citing QUENTIN SHIPLEY SMITH, THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 504–05 (Beverly Paulik Rosenow ed., 1962)).

73. Manufactured Hous. Cmtys. of Wash. v. State, 142 Wash. 2d 347, 359, 13 P.3d 183, 189 (2000) (citing QUENTIN SHIPLEY SMITH, THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 504–06 (Beverly Paulik Rosenow ed., 1962)).

of the U.S. Constitution worked and lived. Perhaps the most obvious differences between the experiences of the Washington framers and that of the federal constitutional framers are historical and geographical.[74] Although some of the language in the eminent domain section of the Washington constitution is similar to that of the Fifth Amendment,[75] "the vast differences in culture, politics, experience, education, and economic status between the Northwestern framers of 1889 and the Eastern framers of the U.S. Bill of Rights in 1789" make any comparisons of intent between the drafters of the Washington constitution and the Federal Bill of Rights tenuous at best.[76]

Although it is not entirely clear what the Washington constitutional framers meant by terms such as public use, it seems that they intended to provide more property protection in Washington than the U.S. Constitution provides. The Washington framers likely wanted to make it more difficult for the state and municipalities to exercise eminent domain by requiring the judiciary, as opposed to the legislature, to determine whether a use is actually public. By not deferring to legislative determinations, the framers sent a clear signal that legislatures could not be trusted to make objective determinations of public use.[77]

Even if one could determine the intent of the framers of the Washington constitution, not everyone agrees that the framers' intent should control.[78] For example, some scholars argue that the intent of the people should control, as the Constitution begins, "We the people."[79] Another

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74. The U.S. Constitution was written in 1787 in Philadelphia, Pennsylvania. U.S. CONST. art. VII. The Washington constitution was written in Olympia, Washington, in 1889. Dolliver, *supra* note 68, at 163.

75. The Washington constitution states, in part, "No private property shall be taken or damaged for public or private use without just compensation having been first made." WASH. CONST. art. I, §16 (amended 1920). Similarly, the Fifth Amendment of the U.S. Constitution states, in part, "[N]or shall private property be taken for public uses, without just compensation." U.S. CONST. amend. V.

76. UTTER & SPITZER, *supra* note 69, at 3–4.

77. Dolliver, *supra* note 68, at 173. Interestingly, Washington courts have recently provided a considerable amount of deference to legislative determinations of public use despite the constitutional mandate that public use be a judicial determination. *See infra* text accompanying notes 83–104. *See also, e.g.*, Cent. Puget Sound Reg'l Transit Auth. v. Miller, 156 Wash. 2d 403, 411 n.2, 128 P.3d 588, 593 n.2 (2006) (citing City of Des Moines v. Hemenway, 73 Wash. 2d 130, 138–39, 437 P.2d 171, 176 (1968) (stating "while the determination of public use is for the courts, this court has explicitly stated that it will show great deference to legislative determinations.").

78. *Compare* Dolliver, *supra* note 68, at 166 (arguing that an examination of the framers' intent is necessary to understand constitutional provisions), *with* UTTER & SPITZER, *supra* note 69, at 8 (citing John Sundquist, *Construction of the Wisconsin Constitution—Recurrence to Fundamental Principles,* 62 MARQ. L. REV. 531, 535 (1979)), *and* COOLEY, *supra* note 42, at 6 (arguing that the people's intent should control the meaning of constitutional provisions).

79. UTTER & SPITZER, *supra* note 69, at 8 (citing John Sundquist, *Construction of the Wisconsin Constitution—Recurrence to Fundamental Principles,* 62 MARQ. L. REV. 531, 535 (1979)); *see also* Albright v. City of Spokane, 64 Wash. 2d 767, 770, 394 P.2d 231, 233 (1964) ("It is axiomatic that words in the constitution must be given their common and ordinary meaning. This is so because

approach is to say that it is not only the people's intent that controls, but also "the general intent and philosophy that underlie the entire constitution."[80] However, it is no more clear what "the people" thought of the public use requirement than it is clear what the framers thought, nor does "the general intent and philosophy" of the entire constitution provide much guidance.

3. Factor Four: Preexisting State Law

The Washington Supreme Court has adopted a three part test for determining whether a proposed condemnation is lawful under the state constitution.[81] "For a proposed condemnation to be lawful, the condemning authority must prove that (1) the use is really public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose."[82] The determination of whether a use is public is a question for the judiciary, although legislative pronouncements of public use are entitled to great deference.[83] Courts defer to legislative determinations for the latter two prongs.[84]

In some cases, Washington courts have narrowly interpreted what constitutes a public use, thus protecting private property rights.[85] For example, in *Hogue v. Port of Seattle*, the court held that the legislature violated the state constitution by passing an act authorizing the Port of Seattle to condemn land in order to build industrial sites that would be operated by or sold to private individuals and corporations.[86] Because this exercise of eminent domain would have taken land from private property owners and given it to private corporations that, in the Port of Seattle's view, would put the land to a better use, the taking was specifi-

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the constitution is the expression of the people's will, adopted by them."); COOLEY, *supra* note 42, at 6.

80. UTTER & SPITZER, *supra* note 69, at 8

> (It was undoubtedly part of the people's intent to create a system of government [that] guaranteed rights that conformed with all the then-current principles of democracy, representative government, state sovereignty, and fundamental human rights. This general intent should be considered and honored whenever a party urges a construction of the constitution that appears to violate any of these basic principles, whether expressly stated in the constitution or not.).

81. HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth., 155 Wash. 2d 612, 629, 121 P.3d 1166, 1174–75 (2005) (citing State *ex rel.* Wash. State Convention & Trade Ctr. v. Evans, 136 Wash. 2d. 811, 817, 966 P.2d 1252, 1255 (1998)).

82. *Id.* at 629, 121 P.3d at 1174–75 (citing State *ex rel.* Wash. State Convention & Trade Ctr. v. Evans, 136 Wash. 2d. 811, 817, 966 P.2d 1252, 1255 (1986)).

83. *Id.* at 629, 121 P.3d at 1175 (citing *In re* City of Seattle, 96 Wash. 2d 616, 624–25, 638 P.2d 549, 555 (1981)).

84. *Id.* at 629–30, 121 P.3d at 1175.

85. *See infra* text accompanying notes 86–95.

86. 54 Wash. 2d 799, 825, 827, 341 P.2d 171, 186, 187 (1959).

cally prohibited by the Washington constitution.[87] That is to say, the taking was nothing more than taking property for a private purpose.[88] Although the legislature had determined such uses were in fact public uses, the court said:

> No matter how desirable from an operating standpoint the Port's exclusive control of land use in a given area may appear to be, it is the duty of the courts to uphold the rights of private property against the inroads of public bodies who seek to acquire it for private purposes which they honestly believe to be essential for the public good.[89]

Similarly, in *In re City of Seattle*, the court again struck down an attempted exercise of eminent domain, reasoning that the taking was not for a public use.[90] In that case, the city of Seattle attempted to condemn property in order to effectuate the Westlake Project,[91] which is the current Westlake Center shopping mall and surrounding land in downtown Seattle.[92] As originally formulated, the city intended to condemn land under the Westlake Project in order to lease some of the property to private retail shops.[93] The court struck down this use of eminent domain, holding that "where the purpose of a proposed acquisition is to acquire property and devote only a portion of it to truly public uses, the remainder to be rented or sold for private use, the project does not constitute a public use."[94] Because the retail shops were not merely incidental to the other proposed purposes of the project, which included creating a public square and museum, but rather were central to the project, the project could not be considered a public use.[95]

Although these two decisions protect private property rights to the extent possible under the state constitution, Washington courts have not always done so. For example, in *State ex rel. Washington State Convention and Trade Center v. Evans*, the court held that the state had the authority to condemn property to expand the Washington State Convention and Trade Center, even though part of the land would be sold to a private developer for retail shopping space.[96] The court first reasoned

87. *Id.* at 827, 341 P.2d at 187.

88. *Id.*

89. *Id.* at 838, 341 P.2d at 193.

90. 96 Wash. 2d 616, 625, 638 P.2d 549, 555 (1981).

91. *Id.* at 618, 638 P.2d at 551.

92. Westlake Center is a retail shopping mall that includes a station for the first and only Seattle Monorail. For more information, see http://www.westlakecenter.com.

93. *In re City of Seattle*, 96 Wash. 2d at 623, 638 P.2d at 554.

94. *Id.* at 627–28, 638 P.2d at 556.

95. *Id.* at 629, 638 P.2d at 557.

96. 136 Wash. 2d 811, 813, 815, 966 P.2d 1252, 1253–1254 (1998).

that the private use of the property, namely the retail shops, was merely incidental to the public use and did not impermissibly mix private and public uses in violation of the constitution.[97] The court attempted to distinguish this case from *In re City of Seattle* on the grounds that the primary purpose of the condemnation in this case was to expand the exhibition space of the Convention Center, whereas in *In re City of Seattle*, the primary purpose of the project was to add retail shops.[98] Because the state could expand the exhibit space without the private development, the court reasoned, the fact that private development was occurring along with the public use of expanding the exhibit hall was immaterial.[99] Moreover, the court rejected the argument that since the private development was partially funding the expansion of the exhibit hall, that necessarily "corrupt[ed] the public nature of that project."[100] Even though private development was economically essential to the project moving forward, the court did not find this problematic in terms of the public use analysis of the overall project.[101] Finally, the court held that a legislature determination that condemning the property was necessary to effectuate the project was "conclusive in the absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud."[102] Since the property owners could not produce evidence of fraud or arbitrary and capricious conduct, the court upheld the exercise of eminent domain.[103] The court made this "determination" in spite of the state constitutional requirement that the judiciary, not the legislature, determine whether a proposed use really is public.[104]

Hogue, *In re City of Seattle*, and *State ex rel. Washington State Convention and Trade Center* represent the most current public use jurisprudence in Washington. As the courts have oscillated between two conceptions of public use, the most recent of which is far less demanding of the condemnor, it is not entirely clear what "public use" means in Washington.[105] Courts originally seemed to require that the entire project be a public use, but recently courts seem to be more open to mixed uses.[106]

97. *Id.* at 819, 966 P.2d at 1256.
98. *Id.* at 819–20, 966 P.2d at 1256.
99. *Id.* at 820, 966 P.2d at 1257.
100. *Id.* at 819, 966 P.2d at 1256.
101. *Id.*
102. *Id.* at 823, 966 P.2d at 1258.
103. *Id.*
104. WASH. CONST. art. I, §16 (amended 1920).
105. *See supra* text accompanying notes 83–104.
106. *See supra* text accompanying notes 83–104.

Given the most recent cases, Washington courts have expanded the acceptable bounds of public use in a way that is detrimental to private property protection. While Washington has historically given its citizens greater property protection by defining public use literally[107] (by contrast, federal courts have broadly interpreted public use under the Takings Clause[108]), the future is unclear as to whether Washington courts will continue to provide greater property protection under the state constitution or follow the federal model.

Some Washingtonians still believe that the state constitution protects property rights better than the Federal Constitution.[109] After the U.S. Supreme Court's controversial decision in *Kelo v. City of New London*, which upheld an exercise of eminent domain to effectuate an economic redevelopment plan under the Fifth Amendment,[110] Washington Attorney General Rob McKenna issued a statement saying that condemnations of the type at issue in *Kelo* would potentially be struck down in Washington due to a more strict definition of "public benefit."[111] Interestingly, McKenna chose to use the words "public benefit" rather than "pubic use," thereby indicating that the nature of eminent domain has greatly expanded both nationally and here in Washington.[112] Thus,

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107. Manufactured Hous. Cmtys. of Wash. v. State, 142 Wash. 2d 347, 360, 13 P.3d 183, 189 (2000). Although the court claims to have consistently applied a literal definition of public use, the court has arguably not done so. *See supra* text accompanying notes 83–104.

108. *Manufactured Hous. Cmtys. of Wash.*, 142 Wash. 2d at 359, 13 P.3d at 189. For example, while federal courts have held that as long as "the legislature's purpose is legitimate and its means not irrational, a legislative taking can and will withstand a public use challenge [under the Federal Constitution] provided just compensation is paid," *id.* at 360 (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242 (1984)), Washington courts have declined to adopt such a broad interpretation. *See supra* Part II.C.3.

109. *See* Editorial, *Private vs. Public Land: Whose Property Right?*, SEATTLE TIMES, June 27, 2005, at B4.

110. 545 U.S. 469, 125 S.Ct. 2655, 2665 (2005).

111. Statement, Rob McKenna, Wash. State Attorney Gen., Attorney General McKenna Comments on the Use of Eminent Domain for Private Purposes (June 23, 2005) (2005 WLNR 10026979). In 2006, there were nine bills proposed in the Washington Legislature that were written to specifically outlaw condemnations like those that occurred in *Kelo*, namely condemnations for "economic redevelopment." *See* H.B. 2427, 59th Leg., 2006 Reg. Sess. (Wash. 2006); H.B. 2626, 59th Leg., 2006 Reg. Sess. (Wash. 2006); H.B. 2854, 59th Leg., 2006 Reg. Sess. (Wash. 2006); H.B. 2924, 59th Leg., 2006 Reg. Sess. (Wash. 2006); H.B. 3017, 59th Leg., 2006 Reg. Sess. (Wash. 2006); H.J. Res. 4217, 59th Leg., 2006 Reg. Sess. (Wash. 2006); S.B. 6345, 59th Leg., 2006 Reg. Sess. (Wash. 2006); S.B. 6388, 59th Leg., 2006 Reg. Sess. (Wash. 2006); S.B. 6701, 59th Leg., 2006 Reg. Sess. (Wash. 2006). If Attorney General McKenna was correct in stating that condemnations like those in *Kelo* would potentially be struck down in Washington, then there would be no need for a law to specifically outlaw such condemnations. This highlights that the definition of public use has expanded such that even the Washington Attorney General cannot state with any certainty whether a condemnation for economic redevelopment would be upheld or not under Washington case law.

112. *Compare* Manufactured Hous. Cmtys. of Wash. v. State, 142 Wash. 2d 347, 371–73, 13 P.3d 183, 195–96 (2000) (stating that "public purpose" and "public use" are not the same thing, only the latter being an appropriate basis for condemnation through eminent domain; holding that "al-

although Washington supposedly provides more property protection under its state constitution than is provided by the Federal Constitution, private property may not be as protected in Washington as some believe it is.

4. Factor Six: Whether the Clause at Issue Addresses a Matter of Particular State or Local Concern

The Washington Supreme Court has determined, with little or no analysis, that private property rights and the exercise of eminent domain are matters of local concern.[113]

As this review of the application of the *Gunwall* factors to eminent domain illustrates, Washington courts should provide substantially more property rights protection under the Washington constitution than other courts provide under the U.S. Constitution. First, the text of the Washington constitution provides explicit protections not present in the U.S. Constitution.[114] Second, although decisions have been mixed in recent years, Washington courts have historically interpreted public use in a narrow way, such that private property rights are more protected under the Washington constitution.[115] However, it is unclear whether this remains true today.[116] Finally, Washington courts have held that private property rights and the exercise of eminent domain are matters of local concern, thus making it more likely that the Washington constitution provides greater property protection than the U.S. Constitution.[117] Because little is known about the intent of the Washington framers regarding terms such as public use, Washington's constitutional and common law history provides little insight into whether the Washington constitution in fact provides greater property protections. However, as this representative review of Washington case law reveals, it seems as though Washington courts are not consistently providing as much property protection as they could and should under the state constitution.

In summary, the current broad formulation of public use under the Takings Clause, as well as the unstable view of public use under the

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though preserving dwindling housing stocks for a particularly vulnerable segment of society provides a 'public benefit,' this public benefit does not constitute a public use"), *with* State *ex rel.* Wash. State Convention & Trade Ctr. v. Evans, 136 Wash. 2d 811, 820, 966 P.2d 1252, 1257 (1998) (holding that the private development involved in the expansion of the convention center was merely a "means to an end, but it is not an end in and of itself," and thus did not corrupt the public nature of the overall expansion project).

113. *Manufactured Hous. Cmtys. of Wash.*, 142 Wash. 2d at 361, 13 P.3d at 190.

114. *See supra* text accompanying notes 57–67.

115. *See supra* text accompanying notes 85–95.

116. *See supra* text accompanying notes 96–108.

117. *See supra* text accompanying note 113.

Washington constitution, is problematic from the private property owner's perspective because any legislative pronouncement of public use means that a family could lose its home.[118] Under the U.S. Constitution, the Court has defined public use so broadly that virtually any benefit to the public, no matter how slight, will satisfy the public use requirement of the Fifth Amendment.[119] Although Washington courts have not defined public use as broadly as the U.S. Supreme Court has, it is not entirely clear what constitutes a public use in Washington due to seemingly contradictory opinions.[120] Thus, private property owners are left with almost no protection under the U.S. Constitution and uncertain protection under the Washington constitution from takings that primarily benefit private parties, not the entire public. However, these are by no means the only obstacles property owners must overcome in protecting their property.

D. Washington Courts Further Limit Property Protection by Deferring to Condemnors' Desires Regarding the Type of Interest and Amount of Property Necessary to Effectuate a Project

Recently, the Washington Supreme Court cemented its dedication to providing fewer private property protections when it allowed a condemnor to take more property than was arguably necessary to effectuate the public project.[121] In *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, the court upheld an exercise of eminent domain by the city of Seattle in order to build the now-defunct Seattle Monorail.[122] While this decision may seem logical, as providing public transportation is clearly a public use,[123] a more detailed examination reveals the problematic nature of the decision in terms of private property protection. In this case, HTK Management (HTK) owned a parking garage in downtown Seattle that the city wanted to condemn in order to build monorail

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118. Although a condemnee receives compensation for any property lost through eminent domain, it is arguably impossible to adequately compensate a homeowner who does not want to sell his or her property due to emotional ties to the home. *See supra* text accompanying notes 30–32.

119. *See supra* text accompanying notes 36–48.

120. *Compare* Hogue v. Port of Seattle, 54 Wash. 2d 799, 827, 341 P.2d 171, 186, 187 (1959), *and In re* City of Seattle, 96 Wash. 2d 616, 625, 638 P.2d 549, 555 (1981), *with* State *ex rel.* Wash. State Convention & Trade Ctr. v. Evans, 136 Wash. 2d 811, 813, 815, 966 P.2d 1252, 1253–1254 (1998).

121. *See* HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth., 155 Wash. 2d 612, 616, 121 P.3d 1166, 1168 (2005).

122. *Id.*

123. *See, e.g.*, WASH. REV. CODE § 8.12.030 (2004). This statute states, "Every city and town and each unclassified city and town within the state of Washington, is hereby authorized and empowered to condemn land and property . . . for streets, avenues, alleys, [and] highways." *Id.*

stations.[124] HTK challenged the taking and claimed, among other things, that the city did not need a fee simple absolute interest in the entire parcel.[125] Instead, HTK argued that the city needed a fee simple interest in only a portion of the property and an easement in the remainder, as the Seattle Monorail Project (SMP) had no plan to use the latter portion indefinitely but rather needed it only for construction purposes.[126] Thus, HTK urged the court to review SMP's decision to condemn a fee simple interest in the entire parcel under the first prong of the public use test (whether the use is public, which is a decision for the court) rather than under the third prong (whether the property at issue and the interest claimed is necessary, a decision in which courts defer to legislative determinations).[127] The court rejected HTK's suggestion, holding instead that "[a] declaration of necessity by a proper municipal authority is conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud."[128] The court noted that even though SMP had no plan to put the entire parcel to a public use indefinitely, it did plan to use the parcel for a public use for at least ten years.[129] However, SMP admitted that the "excess" property could easily be sold to help pay for the monorail project.[130] Nevertheless, the court overlooked this fact and held that SMP had fulfilled its burden of proving a fee simple absolute interest was necessary rather than an easement.[131]

Thus, not only must private property owners in Washington overcome overly broad definitions of public use in defending their property rights,[132] they must also overcome legislative determinations of what type of interest is necessary, as well as whether all of the land at issue is necessary to complete the public project.[133] As to the latter portion of this burden, the *HTK Management* court made it clear that it is virtually impossible for the property owner to overcome the legislative pronouncement of necessity.[134] Once the legislature has determined the property is

124. *HTK Mgmt., L.L.C.*, 155 Wash. 2d at 619, 121 P.3d at 1170.

125. *Id.* at 630, 121 P.3d at 1175.

126. *Id.*

127. *Id.*

128. *Id.* at 629, 121 P.3d at 1175 (citing City of Des Moines v. Hemenway, 73 Wash. 2d 130, 139, 437 P.2d 171, 177 (1968)).

129. *Id.* at 633, 121 P.3d at 1177.

130. *Id.* at 636, 121 P.3d at 1178.

131. *Id.* at 638, 121 P.3d at 1179. The court also noted the cost of a fee simple interest versus an easement, stating that the cost of an easement in addition to the "likely cost[s] of damages due to a ground lessee" could easily be more expensive than a fee simple interest. *Id.*

132. *See supra* text accompanying notes 85–108.

133. *See supra* text accompanying notes 121–31.

134. HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth., 155 Wash. 2d 612, 629, 121 P.3d 1166, 1175 (2005); *see also supra* text accompanying note 128.

necessary and that a fee interest is necessary, the only thing left for the property owner to do is to pack; even where the condemnor admits there is "excess" property, the court is uninterested in questioning such legislative determinations.

III. PUBLIC USE ABANDONMENT AND NON-FULFILLMENT UNDER THE U.S. AND WASHINGTON CONSTITUTIONS

The courts' willingness to expand the definition of public use is problematic from the private property owner's perspective, as is the deference courts give to legislative determinations of the amount of land and the type of interest required for the project. These problems illustrate the ease in which private property rights can be stripped away. However, there may be an even greater threat to private property rights.

From the private property owner's perspective, the power of condemnors to abandon or fail to carry out the public use of the property once the condemnor receives title to the property is just as problematic, and perhaps more so, than the other problems previously discussed. If a condemnor carries out a project on only a portion of the condemned land and that project only marginally benefits the public, the condemnee is still benefiting in some sense; the condemnee is part of the "public" and therefore can benefit from the project to the same extent as the rest of the community. However, if that project ceases, the only person who benefits from the condemnation is the new property owner. Thus, the end result would be as if the condemnation were for a private use, which the Washington constitution explicitly prohibits and the U.S. Constitution should prohibit.[135] Despite this result, courts have upheld such rights for condemnors under both constitutions.[136]

A. The U.S. Supreme Court Supports Condemnors' Right to Abandon the Public Use

In 1932, the U.S. Supreme Court affirmed its commitment to protecting the rights of condemnors while limiting the rights of condemnees. In *Reichelderfer v. Quinn*, Congress directed District Commissioners in Washington D.C. to build a firehouse in place of an existing park.[137]

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135. *See* WASH. CONST. art. I, §16 (amended 1920); *supra* text accompanying notes 49–53.

136. There are a few cases from the 1800s and early 1900s that held that condemnees had a reversionary interest if the condemnor failed to fulfill the public use. *See, e.g.*, Hooker v. Utica & Minden Tpk. Rd. Co., 12 Wend. 371 (1834); Gebhardt v. Reeves, 75 Ill. 301 (1874); Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208 (1905). However, the majority of courts have held that the condemnee has no reversionary interest if such interest is not specified in the title or the applicable statute. *See, e.g.*, *infra* note 145 and accompanying text.

137. Reichelderfer v. Quinn, 287 U.S. 315, 317 (1932).

People who owned lands that were next to the park brought suit against the Commissioners, claiming that because the park land was originally condemned and dedicated by the District to be used as a park, the District violated the Fifth Amendment by abandoning that use.[138] The Court rejected this argument, holding that because the District received title in fee simple absolute when it originally condemned the land, the District also had the right to put the property to a different use.[139] The fact that the District had dedicated the property for use as a park did not affect the Court's analysis; the Court noted that the dedication was nothing more than a policy announcement that was not binding on future use decisions.[140] Thus, although the District put the property to a new public use, namely as a site for a firehouse, the Court did not rely on this fact in its analysis. Instead, the Court focused on the District's right, as a holder of a fee simple absolute title, to use the property as it deemed appropriate. Therefore, it would seem to make little difference if the District used the property as the site for a firehouse or sold it to a private owner.

B. The Washington Supreme Court Also Supports Public Use Abandonment

The Washington Supreme Court has similarly allowed condemnors to completely abandon the public use of the property without providing any rights for condemnees to regain the property. In *Reichling v. Covington Lumber Co.*, the city of Seattle condemned Reichling's property "for the purposes of its Cedar river water system," thereby receiving fee simple title to Reichling's property.[141] After the condemnation, the city granted a license to Covington Lumber Company (Covington) to build a logging road over Reichling's former land.[142] Reichling then brought suit against Covington, claiming that if the city was not using the land for the public use advanced at the condemnation proceedings, then he was the rightful owner of the land.[143] The court rejected Reichling's claim, holding that because the city received the property in fee simple absolute, it had the right to devote the property to any use it deemed appropriate.[144] The court stated, "Where a fee simple is taken, the weight of authority is that there is no reversion, but, when the particular use ceases, the prop-

138. *Id.* at 317.
139. *Id.* at 318.
140. *Id.*
141. 57 Wash. 225, 227, 106 P. 777, 777 (1910).
142. *Id.* at 227, 106 P. at 778.
143. *Id.*
144. *Id.* at 228, 106 P. at 778.

erty may, by authority of the state, be disposed of for either public or private use."[145]

Although these cases were decided nearly eighty years ago and are settled law, the issue is likely to come to the forefront again because of the broad definition of public use under the U.S. Constitution, as well as the expanding definition of public use under the Washington constitution. As Washington courts are more likely to approve exercises of eminent domain today that would not have withstood the public use scrutiny of earlier twentieth century courts,[146] property owners will have little chance of preventing condemnors from condemning private property. Therefore, the only way private property owners can protect themselves from such takings is to challenge the taking collaterally.[147]

Recently, the city of Seattle narrowly escaped litigation over public use abandonment when voters voted against the Monorail Project (the "Project") in November 2005.[148] The city condemned a great deal of the property needed for the Project before voters subsequently revoked the city's authority to build the monorail. After voters rejected the monorail, the city decided to sell the property it acquired in order to offset its expenses.[149] Many property owners, including HTK, challenged the origi-

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145. *Id.* (citing 2 JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN § 861 (596), at 1500 (3d ed. 1909); 3 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §1023 (589), at 1620 (5th ed. 1911)); *see also* Seattle Land & Improvement Co. v. City of Seattle, 37 Wash. 274, 79 P. 780 (1905).

146. *Compare* Hogue v. Port of Seattle, 54 Wash. 2d 799, 825, 827, 341 P.2d 171, 186, 187 (1959), *with* State *ex rel.* Wash. State Convention & Trade Ctr. v. Evans, 136 Wash. 2d 811, 813, 815, 966 P.2d 1252, 1253–1254 (1998).

147. A condemnee collaterally challenges a taking when the condemnee brings a separate action challenging the condemnation *after* the condemnation has occurred. *See In re* Peterson's Estate, 12 Wash. 2d 686, 725–26, 123 P.2d 733, 751 (1942). This is in contrast to a direct challenge, which occurs when the condemnee challenges the taking *during* the original condemnation proceedings. *See id.*

148. *See Seattle Popular Monorail Authority, Seattle Monorail Project, Proposition 1* (Nov. 8, 2005), http://www.metrokc.gov/elections/contests/measureinfo.aspx?cid=17046&eid=1209. This initiative was rejected by sixty five percent of voters. King County Election Results (Nov. 8, 2005), http://www.metrokc.gov/elections/2005Nov/resPage20.htm.

149. *See* Larry Lange, *Monorail Project Plans Quick Land Sale*, SEATTLE POST-INTELLIGENCER, Jan. 18, 2006, at B4. *See also Seattle Monorail Project*, http://monorail property.com (last visited Sept. 8, 2006) (listing all the property that was condemned for the Seattle Monorail Project that was later sold to recoup losses incurred by the Project). For a listing of the price Seattle Monorail Project (SMP) paid for various properties, as well as the price for which SMP subsequently sold those properties, see *Monorail Land Sell-Off*, SEATTLE TIMES, June 28, 2006, *available at* http://seattletimes.nwsource.com/news/local/monorail/monorail28.html. SMP made approximately eleven million dollars from selling property it acquired for the monorail. Mike Lindblom, *Monorail Deals, Big and Small*, SEATTLE TIMES, June 28, 2006, at A12. Although SMP did lose money on a few properties, SMP was able to sell the majority of the properties for significantly more than it paid for each property, selling one particular property for fifteen million dollars. *Id.* This was sixty-six percent more than SMP paid for the property. *Id.*

nal taking,[150] and it seemed likely that other property owners would challenge the city's ability to abandon the public use and sell the property to a third party. However, three of the four property owners who challenged the original takings were able to subsequently repurchase their property, thereby avoiding litigation,[151] although they did so at a much higher cost than the original compensation for the taking.[152] For example, one family had to pay $70,000 more to repurchase their property than SMP paid them to condemn it.[153] Even though SMP has so far managed to avoid litigation on the issue of public use abandonment, given the plethora of public projects and the increased use of eminent domain to effectuate those projects, it is likely that public use abandonment will be litigated in Washington in the near future.

Public use abandonment has not been litigated in Washington to any great degree since *Reichling*, but courts in other jurisdictions have addressed the issue in recent years.[154] As the following discussion illustrates, this issue has not disappeared, and given the renewed interest in condemnations due to the controversial *Kelo* decision,[155] it is likely property owners will bring similar cases both in Washington and in other states.

IV. PUBLIC USE ABANDONMENT OUTSIDE OF WASHINGTON

All other state courts that have recently addressed public use abandonment have reached the same result: condemnors have the right to abandon the public use of the property.[156] The basic rationale for upholding such rights for condemnors is that the condemnor received title to the

150. *See* HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth., 155 Wash. 2d 612, 630, 121 P.3d 1166, 1175 (2005).

151. Jennifer Langston, *Balancing Payoff of Monorail Land Sell-Off*, SEATTLE POST-INTELLIGENCER, May 22, 2006, at A1. Cleve Stockmeyer, an SMP board member, stated in December 2005 that "he personally was sympathetic with property owners whose land was taken and their 'anguish at having their lives and businesses taken away for nothing, which is something we are not allowed to compensate them for under state law.'" Jeanne Language Jones, *Loose End: Who Owns 'Sinking Ship'?*, PUGET SOUND BUSINESS JOURNAL, Dec. 2, 2005, *available at* http://seattle.bizjournals.com/seattle/stories/2005/12/05/story4.html.

152. Jennifer Langston, *Balancing Payoff of Monorail Land Sell-Off*, SEATTLE POST-INTELLIGENCER, May 22, 2006, at A1.

153. Mike Lindblom, *Little Café to Survive Monorail Meltdown*, SEATTLE TIMES, Apr. 21, 2006, at B1. In addition to the $70,000 price increase, the family estimates it had to pay an additional $50,000 in attorney fees to compensate real estate experts used in fighting the condemnations. *Id.*

154. *See infra* Part IV.

155. *See supra* text accompanying notes 41–46.

156. *See, e.g.*, Diaz v. City of Biloxi, 748 So. 2d 161, 163 (Miss. Ct. App. 1999); Indigo Realty Co., Ltd. v. City of Charleston, 314 S.E.2d 601, 602 (S.C. 1984).

property in fee simple absolute;[157] thus, the condemnor can do whatever it wants with the property. Although this result is logical from the perspective of property law and the need for certainty in titles,[158] it has led to vastly inequitable results from the perspective of the condemnee in eminent domain proceedings. The following discussion illustrates the need for substantive and procedural protections for condemnees to prevent fraudulent and speculative takings.

One example of an inequitable result is *Diaz v. City of Biloxi*, where the city of Biloxi condemned private property to effectuate its Biloxi Waterfront Master Plan.[159] Ten years after the original taking, the former property owners sued the city, claiming that it abandoned the plan, or, alternatively, that the public use had been abandoned, and thus, the former property owners had a right of reversion.[160] The court affirmed summary judgment in favor of the city, holding that the determination of public use, and hence the validity of the taking and title, occurred at the time of the original taking.[161] Although the city may have subsequently changed the use of the property, the court held that the taking was valid because it occurred in good faith; thus, the former property owners had no claim for reversion absent a specific reversionary interest in the title.[162]

This result is inequitable for a number of reasons. First, the court was unable to examine whether the original taking was in fact valid.[163] A Mississippi statute required any challenge to an exercise of eminent domain to occur either within the original eminent domain proceeding[164] or as an appeal within ten days of the original proceeding.[165] Because the condemnees did not appeal the condemnation decision within ten days, they waived any right to challenge the taking.[166] This is problematic because the condemnees likely had no way of knowing within ten days of the original condemnation whether or not the public use would occur.

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157. *See* 28 AM. JUR. 2D *Estates* §13 (2000). A fee simple interest, also called fee simple absolute, "represent[s] the entire and absolute interest and property in the land." *Id.* This means that the holder of the fee simple absolute interest is the only person who has legal title to the property. *See id.*

158. When it is unclear which party to a transaction has legal title to the property, many potential problems arise. The most obvious problem arises when one party tries to sell the property to a third party; if one does not have legal title to property, then one obviously cannot sell that property. Additionally, property owners may be hesitant to invest in or maintain property if they are uncertain whether they can later sell the property.

159. *Diaz*, 748 So. 2d at 162.

160. *Id.*

161. *Id.* at 162–163.

162. *See id.* at 163–64.

163. *Id.* at 163.

164. *Id.* (citing MISS. CODE ANN. §11-27-15 (West 1999)).

165. *Id.* (citing MISS. CODE ANN. §11-27-29 (West 1999)).

166. *Id.*

Allowing such a short period of time to appeal, coupled with the inability to collaterally challenge the taking, leaves condemnees with little protection from fraudulent and speculative takings.

Moreover, although the city of Biloxi may have in fact condemned the property in good faith by planning to use it for a public purpose, it was not required to present evidence *proving* good faith. Instead, the court presumed the city was acting in good faith in the absence of evidence proving otherwise.[167] This means the burden of proof was on the condemnee to prove bad faith, which is difficult in the absence of a "smoking gun" memo, or something similar, detailing bad faith.

In another case, a court upheld a taking after the condemnor abandoned the public use just six months after the condemnation. [168] In *Indigo Realty Company, Ltd. v. City of Charleston*, the city of Charleston threatened to condemn property owned by Indigo Realty Company (Indigo) in order to widen a street.[169] Indigo chose to voluntarily sell the property, although the city admitted that had the company decided not to voluntarily sell, the city would have initiated condemnation proceedings.[170] Six months after the city acquired the property, it decided not to widen the street due to financial problems.[171] Indigo attempted to repurchase the property for the original purchase price, but the city instead chose to sell the land to a private developer who planned to use it for a private purpose.[172] When Indigo sued the city to regain its property, the court held that the validity of a taking must be judged at the time the title transfers.[173] Because the original taking was for a public purpose, namely widening a public road, the city had valid fee simple title to the property, and Indigo had no claim to repurchase the land.[174] The court noted that if the result in the case seemed unduly harsh,[175] the issue was for the legislature, not the court, to rectify.[176]

The inequity in *Indigo Realty Company* is striking. Indigo decided to sell its land, believing it would be put to a use that would benefit the public.[177] Instead, a private developer ended up with title to the prop-

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167. *Id.* at 164. "The proper question to be resolved by the trial court was . . . whether the condemnation had been granted upon a good faith request for a public purpose. The Appellants have not demonstrated that the condemnation was not predicated upon a good faith public purpose." *Id.*

168. Indigo Realty Co., Ltd. v. City of Charleston, 314 S.E.2d 601 (S.C. 1984).

169. *Id.* at 602.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *See id.* at 603.

175. Which seems to be a bit of an understatement!

176. Indigo Realty Co., Ltd. v. City of Charleston, 314 S.E.2d 601, 603 (S.C. 1984).

177. *Id.* at 602.

erty.[178] Although the details of the sale price in either the original sale or the subsequent sale to the developer are not discussed in the case, it is safe to assume that had Indigo been able to negotiate directly with the developer, the terms of the sale would have been different. Even if the sale price was not different, it would have been Indigo, not the city, that retained any increase in value of the property.

Although the results in *Diaz* and *Indigo Realty Company* are inequitable from the perspective of the condemnee, the inequities in the cases are not identical. The amount of time between the taking and the abandonment of the public use is undoubtedly a significant difference between *Diaz* and *Indigo Realty Company*. In *Diaz*, although the city arguably abandoned the public use, the city did not do so until ten years after the taking.[179] The city may have intended to continue the public use indefinitely when it condemned the property, but due to changing circumstances, was unable to do so. However, it is difficult to argue in *Indigo Realty Company* that the city had a good faith intention to use the property for a public purpose and that the city managed its funds in good faith. If the city had managed its funds in good faith, it seems unlikely that its economic status could change so drastically in a six month period that a recently approved project would become financially impossible and not merely postponed.[180] It seems more likely that the city never intended to widen the street in the first place, or that the city recklessly managed its funds, either of which amounts to bad faith.[181] However, because the property owners were not able to produce evidence proving bad faith, the city successfully defended itself.

These cases demonstrate, albeit in varying degrees, the necessity for more procedural and substantive protections for private property owners from arbitrary and harmful takings.

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178. *Id.* at 603.

179. Diaz v. City of Biloxi, 748 So. 2d 161, 162 (Miss. Ct. App. 1999).

180. *Cf. Indigo Realty Co., Ltd.*, 314 S.E.2d at 602.

181. Because courts presume condemnors act in good faith, *see supra* note 167 and accompanying text, one can infer that good faith is an implicit requirement for the exercise of eminent domain. "Good faith" is defined as a "state of mind consisting of (1) honesty in belief or purpose, [or] (2) faithfulness to one's duty or obligation." BLACK'S LAW DICTIONARY 713 (8th ed. 2004). If condemnors act in good faith when exercising eminent domain, they must necessarily manage their funds in a responsible way; recklessness and good faith are logically incompatible. *See id.* at 1298 (defining "reckless" as "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk").

V. A CALL FOR ADDITIONAL PROCEDURAL AND SUBSTANTIVE PROTECTIONS FOR PROPERTY OWNERS

Allowing the condemnor to abandon the public use of the property is problematic for at least two reasons. First, if the condemnor is allowed to abandon the public use, there is no reason to require the condemnor to show a prima facie public use in the first place; it serves as no protection from fraudulent, speculative, or even worse, discriminatory takings.[182] Theoretically, the reason the public use requirement exists is to protect property rights. Whether from a Lockean or republican perspective under the U.S. Constitution, or from the pro-property rights perspective of the Washington constitution,[183] private property rights can be sacrificed only when the public benefits from the taking.[184] But if the public does not benefit, what justification remains for the exercise of eminent domain? Neither the Fifth Amendment nor the eminent domain provisions of the Washington constitution permit the exercise of eminent domain for private purposes,[185] so no justification for such takings should exist.[186]

It may be argued that in order to abandon the public use the condemnor must have necessarily put the property to a public use at some time. After all, one cannot abandon something one has never done. Thus, it could be argued that since the public benefited from some period of public use, the public use requirement is satisfied. However, this argument misses the point. The public use requirement was not intended to be

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182. *See* Kenneth R. Harney, *Domain Decision Weakens Homeowners' Position*, SEATTLE TIMES, July 2, 2005. Dana Berliner, an attorney from the Institute of Justice, the public-interest law firm that represented the [plaintiffs in the *Kelo* case], says only certain categories of people are at a greater risk of being a victim of eminent domain abuse. *Id.* These homeowners include residents in older neighborhoods in desirable locations, such as near the waterfront, working and middle income neighborhoods, and "[n]eighborhoods with high concentration of lower-income, minority residents." *Id.*

183. *See supra* text accompanying notes 15–25. As previously discussed, although it is not entirely clear what the Washington constitutional framers meant by terms such as public use, it is clear that the framers intended to protect property rights from the government; the explicit prohibition of takings for private use evidences this intent. *See* WASH. CONST. art. I, §16 (amended 1920).

184. *See supra* text accompanying notes 26–29; *see also supra* text accompanying notes 105–08.

185. *See* U.S. CONST. amend V; *supra* text accompanying notes 2–3; WASH. CONST. art. I, §16 (amended 1920).

186. It may be argued that it is possible for the public to benefit from a taking even if the taking is for a private purpose. For example, a community could benefit from the increased tax income resulting from a private retail development. However, this argument misses the mark. Neither the U.S. nor Washington constitutions permit takings for private purposes that incidentally include a public benefit; instead, both require that eminent domain be exercised *only* when the property will be put to a public use. *See* U.S. CONST. amend V; WASH. CONST. art. I, §16 (amended 1920). Although public use has been interpreted broadly under both the federal and state constitution, the public character of the project remains a necessary component.

an empty obligation.[187] Rather, it was intended to protect private property rights from government interference, allowing condemnation *only* when the property use would benefit the public.[188] Allowing a condemnor to take property for a public use that only lasts a matter of months, then sell the property to private developers, does not protect private property rights.

Moreover, the idea that condemnees receive "just compensation" for their property and therefore should not have any claim if the public use is abandoned[189] also misses the mark. Although condemnors are always required to pay condemnees "just compensation" for the property taken,[190] monetary compensation is not the only issue. As previously discussed, a home is more than a place that simply provides shelter: property ownership, and more specifically home ownership, can define an individual.[191] That an individual was theoretically compensated for losing his or her property to a private developer does not justify the underlying action. If condemnors exercise eminent domain, they should put the property to a public use.[192] In the absence of a public use, eminent domain should not be involved; instead, free market negotiation should dictate the terms of any property transfer.

Second, and most importantly for Washington residents, it is logically incompatible with Washington eminent domain jurisprudence to allow condemnors to abandon the public use. In *Hogue*, the Washington Supreme Court struck down an exercise of eminent domain in part because the purpose of the taking was to transfer some of the property to private corporations that would develop or operate industrial sites.[193] The court held that this purpose violated the public use requirement, as the Washington constitution specifically prohibits takings for private uses.[194] If this exercise of eminent domain, where not all of the parcels would be sold to private developers, does violate the public use requirement, then

187. *See supra* text accompanying notes 15–25; *supra* text accompanying notes 72–73 and 77.

188. *See supra* text accompanying notes 15–25; *supra* text accompanying notes 72–73 and 77.

189. *See, e.g.*, Reichling v. Covington Lumber Co., 57 Wash. 225, 228, 106 P. 777, 778 (1910) (When [the city] paid the sum fixed as its value and respondent received such sum, all the constitutional requirements had been complied with, and the title fully vested in the city according to the terms of the decree. This being so, it follows that there was, and could be, no reversion of right or interest in respondent to the lands, whether the city used the lands for the purpose indicated in the petition or not.).

190. *See* U.S. CONST. amend. V; WASH. CONST. art. I, § 16 (amended 1920).

191. *See supra* text accompanying notes 30–32. Additionally, the notion that real property is unique and therefore deserving of special protection is buttressed by the fact that courts usually grant specific performance as a remedy for breach of contracts involving the sale of real property. *See, e.g.*, Tombari v. Griepp, 55 Wash. 2d 771, 775–76, 350 P.2d 452, 454–55 (1960).

192. *See* U.S. CONST. amend. V; WASH. CONST. art. I, § 16 (amended 1920).

193. Hogue v. Port of Seattle, 54 Wash. 2d 799, 825, 827, 341 P.2d 171, 186–187 (1959).

194. *Id.* at 827, 341 P.2d at 187.

allowing a condemnor to abandon the public use should also violate the Washington constitution. In both of these situations, at least one of the primary beneficiaries of the taking is a private party not involved in the original condemnation. This private party can put the property to a use that will not benefit the public at all. Thus, both situations end up with the same result, and the method used to transfer the property from the condemnor to a private beneficiary should not validate an otherwise impermissible taking.

A. Courts Should Not Presume Condemnors Act in Good Faith or that the Requested Property and Interest are Necessary

To protect condemnees' rights to the same extent as condemnors' rights, courts should play a more active role in condemnation proceedings. For the property owner, absent a "smoking gun" memo detailing the condemnor's plan to use eminent domain for inappropriate and illegal private purposes, non-Washington courts presume condemnors act in good faith, leaving the property owner with no protection from arbitrary and unjust takings.[195] One can infer that Washington courts would also presume condemnors act in good faith when exercising eminent domain. For example, although Washington courts make the initial determination of whether a use is a public use, courts will defer to legislative determinations concerning how much property is needed and what type of interest is needed.[196] Thus, Washington courts already give a considerable amount of deference to legislative attempts to exercise eminent domain; therefore courts would also likely presume condemnors act in good faith.

However, courts *should not* presume that condemnors act in good faith when attempting to exercise eminent domain. Given the increased value of real estate in many areas[197] and the increasing use of eminent domain for improper purposes throughout the nation,[198] presuming that condemnors act in good faith puts private property rights at risk. Under these conditions, condemnors can make a great deal of money by selling property acquired through eminent domain.[199] As a result, condemnors should now be required to prove they are acting in good faith when bringing condemnation proceedings. Given that condemnors must make

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195. *See supra* Part IV.

196. *See supra* Part II.D.

197. For example, houses in Washington state appreciated 18.42% in 2005. *U.S. Home Prices Continue to Climb, Federal Agency Says*, SEATTLE TIMES, Mar. 2, 2006, at E2. Thus, if a condemnor simply held title to property for one calendar year, he or she could make nearly twenty percent profit, and perhaps more, depending on the neighborhood. *See id.*

198. *See supra* Part IV.

199. *See supra* note 197.

an affirmative showing of public use,[200] requiring condemnors to prove they are acting in good faith will not be overly burdensome during litigation.

A condemnor could prove it was acting in good faith by providing detailed plans for the proposed project and proof that the condemnor has the economic ability to complete the project. This evidence would tend to prove the condemnor is acting in good faith because it is not easily fabricated. Thus, if a condemnor goes to the trouble of producing detailed plans and financial statments, it would serve as sufficient proof of good faith in bringing the condemnation proceeding. Admittedly, requiring condemnors to provide evidence of good faith will by no means prevent all fraudulent or speculative takings. For example, if a condemnor believes it can make a substantial amount of money from selling condemned property, and it has the economic ability to complete the proposed public project, the condemnor could convince the court it is acting in good faith when in fact it has no intention of ever completing the public project. However, providing this first layer of protection is a step in the right direction to providing much needed protection for condemnees.

Because requiring proof of good faith will not deter all fraudulent or speculative takings, courts should also determine whether the property is necessary for the project and whether the type of interest sought is necessary for the project. Currently, Washington courts defer to legislative determinations of necessity, both in terms of the amount of property sought and the interest needed to effectuate the project. Those legislative determinations are considered conclusive in the absence of proof of fraud.[201] However, if courts required the condemnor to prove that all of the property at issue is necessary for the public use and that the interest sought (usually fee simple absolute) is necessary, property owners would receive an additional layer of protection from fraudulent and speculative takings.[202]

Even though requiring proof of necessity would not prevent all fraudulent and speculative takings, it would undoubtedly deter some as condemnors would bear the burden of producing evidence of why the property is necessary and why a fee simple interest is necessary. Currently, condemnors can rely on basic plans during condemnation

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200. *See, e.g.*, HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth., 155 Wash. 2d 612, 629, 121 P.3d 1166, 1174 (2005) (citing State *ex rel.* Wash. State Convention & Trade Ctr. v. Evans, 136 Wash. 2d 811, 817, 966 P.2d 1252, 1255 (1998) ("For a proposed condemnation to be lawful, the *condemning authority must prove* that (1) the use is really public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose.") (emphasis added)).

201. *See supra* Part II.D.

202. *See* HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth., 155 Wash. 2d 612, 657–58, 121 P.3d 1166, 1190 (2005) (Johnson, J., dissenting).

proceedings, but requiring proof would assure that condemnors had thoroughly considered all options before bringing condemnation proceedings.

If these two protections were available for the property owner in the hypothetical introduced at the beginning of this Comment,[203] the property owner may not have lost his or her property. By not presuming the power company was acting in good faith, the court would have required the power company to bear the burden of producing evidence that it actually planned to build the power plant. Since the power company abandoned the project six months after condemning the property, it may not have condemned the property in good faith, and thus, this procedural protection could have saved the property owner from unnecessarily losing his or her home. Additionally, by requiring the power company to prove that all the land at issue was necessary, and that a fee simple absolute interest was necessary, the court would have provided further protection for the homeowner. Although there is no indication in the above hypothetical that anything less than a fee simple interest in the full parcel would suffice to complete the project, requiring the condemnor to prove such facts is an appropriate balance between efficient condemnation proceedings and private property protection.

B. Condemnors Should Use the Property for a Public Use Within a Reasonable Period of Time and for a Specified Period of Time

In addition to requiring the condemnor to bear the burden of producing evidence of good faith, as discussed above, two additional requirements should be imposed on condemnors as a condition of exercising eminent domain.

First, condemnors should be required to use the property for a public use within a reasonable period of time.[204] "Reasonableness," an inher-

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203. *See supra* Part I.

204. In *Kelo v. City of New London*, the Petitioners argued that the Court should adopt this very standard when determining whether the government should be allowed to exercise eminent domain. Brief of Petitioners at 36, Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655 (2005) (No. 04-108). However, the Court rejected this standard, reasoning that such a standard would be too great a departure from precedent. Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655, 2668 (2005). The Court stated,

> Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

Id. at 2668. However, many people, including the Petitioners in *Kelo*, claim that courts should prevent condemnations unless the overall plan is likely to succeed. *See* Brief of Petitioners at 36, Kelo v. City of New London, 545 U.S. 469 (No. 04-108) (2005); *see also, e.g.*, Brief for Professors David

ently malleable standard, does not provide a concrete timeframe for condemnors. However, it is the appropriate approach in order to balance both the legitimate exercises of eminent domain that benefit the public with the interests of private property owners in ensuring their property is not taken for fraudulent or speculative uses. In fact, reasonableness is already the standard for a number of eminent domain matters in Washington. For example, if a condemnor condemns more land than is immediately necessarily to fulfill its project, yet intends to put the remaining land to a public use within a *reasonable* period of time, the condemnation is still valid.[205] Similarly, a condemnor is not required to produce detailed plans for the public use in order to satisfy the public use requirement.[206] Instead, it is only required that the condemnor show the property is *reasonably* necessary to effectuate the public use and that the public use will occur within a *reasonable* period of time.[207] Thus, adding a requirement that the public use must actually occur within a reasonable period of time is generally consistent with Washington eminent domain jurisprudence.

Second, the condemnor should be required to use the property for the public use for a period of time that would be specified in a statute. During the Washington legislature's 2006 Regular Session, several bills were presented that would require exactly this, but none passed.[208] Although it is difficult to say exactly what period of time would be sufficient to protect the rights of both condemnees and condemnors, a period of at least five years but no more than twenty years is an appropriate

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L. Callies et al. as Amici Curiae Supporting Petitioners at 25, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2004 WL 2803192 (stating that a preferred standard for eminent domain would require the condemnor to prove that its need for the land was "not purely speculative, that the proposed use of the land [was] reasonably certain to come to pass."). Moreover, although the Court declined to implement this standard, *see Kelo*, 125 S. Ct. at 2668, the Court did not say such a standard was unconstitutional. Thus, legislatures are free to create such additional protections for property owners.

205. State *ex rel.* Union Trust & Sav. Bank v. Super. Ct. for Spokane County, 84 Wash. 20, 24, 145 P. 999, 1000 (1915), *aff'd*, 84 Wash. 20, 149 P. 324 (1915).

206. Hove v. Port of Seattle, 80 Wash. 2d 392, 398, 495 P.2d 327, 332 (1972) (citing Tacoma v. Welcker, 65 Wash. 2d 677, 684, 399 P.2d 330, 335 (1965)).

207. *Id.* at 398, 495 P.2d at 332.

208. *See* H.B. 3017, 59th Leg., 2006 Reg. Sess. (Wash. 2006) (giving the condemnee the right to repurchase the property if, within seven years of the condemnation, the property acquired for a public purpose is no longer needed and should be sold); H.J. Res. 4217, 59th Leg., 2006 Reg. Sess. (Wash. 2006) (giving the condemnee the right to void the condemnation and regain title to the property if the property is put to a use different than that for which it was originally condemned, has not been substantially put to the stated public use within ten years of the condemnation, or the stated public use has been abandoned for ten years). Another related bill gives a condemnee the right to collect damages in the amount of at least 135% of the fair market value of the property if it is sold by the condemnor to a third party within five years of the condemnation. H.B. 2855, 59th Leg., 2006 Reg. Sess. (Wash. 2006). However, none of these bills passed in either the House or the Senate.

range. Five years is enough time for the condemnor to substantially begin the project; if the project is not substantially started within this period, it seems unlikely it will occur. In this situation, the condemnee should have the option of regaining title to the property. Similarly, requiring that the public use occur for no more than twenty years protects both condemnors and condemnees. Condemnors are not faced with either using the property for a public use in perpetuity or losing the property. Condemnees are protected because condemnors will not exercise eminent domain unless they know the property will be used for a public purpose for a substantial amount of time. If the condemnors fail to fulfill their obligation, the condemnee should have the right to regain title.

Another possible solution to fraudulent and speculative takings is to require that all land taken through eminent domain include restrictions in the title allowing the property to be used only for the stated public use. This could be accomplished through the use of a fee simple determinable[209] or fee simple subject to a condition subsequent.[210] If the title contains such restrictions, then the condemnor cannot subsequently sell the property to someone who will use the property for private purposes, as the restrictions in the title remain even if the property is sold.[211] Therefore, such title restriction could eliminate the possibility of fraudulent or speculative takings.

However, this solution could potentially create more problems than it solves. There are legitimate reasons why a condemnor might abandon the public use of the property that the condemnor cannot anticipate at the time of the condemnation proceedings. For example, recall *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, discussed above.

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209. A fee simple determinable is a fee simple estate that automatically terminates on the happening of a stated event, with title to the property returning to the original property owner. 28 AM. JUR. 2D. *Estates* § 26 (2000). For example, in an action for eminent domain, the condemnor would receive a fee simple determinable, with the condemnee automatically regaining title to the property if the "stated event," which in this case would likely be a termination of the public use, occurs.

210. "An estate in fee simple subject to a condition subsequent is created by any limitation which, in an otherwise effective conveyance of land, (a) creates an estate in fee simple; and (b) provides that upon the occurrence of a stated event the conveyor or his successor in interest shall have the power to terminate the estate so created." Donald v. City of Vancouver, 43 Wash. App. 880, 884, 719 P.2d 966, 968 (1986) (citing RESTATEMENT (FIRST) OF PROPERTY §45 (1936)). For example, in an action for eminent domain, instead of the condemnor receiving title in fee simple absolute, the condemnor would receive title in fee simple subject to the condition that the property is used for a public use. If the condition subsequent occurs, title does not automatically revert to the conveyor; instead, the conveyor must affirmatively assert his claim to the property. Halvorsen v. Pacific County, 22 Wash. 2d 532, 156 P.2d 907 (1945); Lewiston Water & Power Co. v. Brown, 42 Wash. 555, 85 P. 47 (1906); Metro. Park Dist. of Tacoma v. Rigney's Unknown Heirs, 65 Wash. 2d 788, 790, 399 P.2d 516, 517 (1965) (citing Mouat v. Seattle, Lake Shore & E. Ry. Co., 16 Wash. 84, 47 P. 233 (1896); RESTATEMENT (FIRST) OF PROPERTY § 57 (1936)).

211. 28 AM. JUR. 2D. *Estates* § 30 (2000).

When the Seattle Monorail Project condemned property for the monorail, it had no way of knowing that voters would subsequently repeal the Monorail Project entirely.[212] If the land was restricted for use only as a monorail, the city would have no choice but to return the land to the original owners, or else try to seek a release from the condition. Although some property owners, such as HTK, would have happily regained title to the property, many businesses had already reestablished themselves in new locations.[213] Thus, not only would these owners not need the property, but returning title to them may be extremely costly and complicated. The property owners would have to return the compensation they received for the original taking in order to regain title,[214] which may be difficult if they already spent the money on new property. So although using defeasible estates could prevent some fraudulent and speculative takings, it would likely harm property owners more than it would help. Moreover, if the exercise of eminent domain becomes too costly in terms of time and money, cities and other condemnors are likely to abandon such proceedings altogether. This means that if the would-be condemnor is not able to negotiate for the sale of the property directly with the property owner, many beneficial public projects may not occur.

Thus, the combination of these four requirements would provide much-need protections for private property owners: (1) courts not presuming condemnors bring condemnation proceedings in good faith; (2) courts making an independent determination of whether the property at issue is necessary for the public project, as well as whether the requested interest is necessary; (3) condemnors using the property for a public use within a reasonable period of time; and (4) condemnors using the property for a public use for a statutorily specified period. To ensure complete protection, the legislature should provide condemnees with one additional right if the condemnor fails to satisfy his or her statutory obligations: the right to repurchase the property.

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212. *See supra* note 148.

213. *KING 5 News Up Front with Robert Mak: Monorail: Now What?*, (KING 5 television broadcast Nov. 13, 2005), *transcript available at* http://www.king5.com/upfront/showSupplement.jsp?fldid=300.

214. Arguably, the property owner does not have to return the compensation originally received for the property, as allowing the condemnee to keep the money serves as an additional deterrent for condemnors who might otherwise abandon the public use. *See* Kevin L. Cooney, Note, *A Profit for the Taking: Sale of Condemned Property After Abandonment of the Proposed Public Use*, 74 WASH. U. L.Q. 751, 772 (1996).

C. Condemnees Should Have the Right to Repurchase the Property if the Condemnor Fails to Fulfill the Statutory Obligations

If the condemnor fails to put the property to a public use within a "reasonable" period of time,[215] or fails to use the property for a public use for the required statutory period, condemnees should have the right to repurchase the property. The best option is to allow the condemnee to repurchase the property at the original condemnation price. Another, albeit less desirable, option is to allow the condemnee to repurchase the property at the current market value.

1. Repurchase at Condemnation Price

The best option is to allow the condemnee to repurchase the property at the condemnation price, which would require the legislature to enact a statute providing such right of repurchase.[216] This option is equitable from the condemnee's perspective, as the condemnee is essentially able to "undo" the taking by giving back the money and regaining title to the property.[217] In giving the condemnee such a right, the legislature simultaneously deters condemnors from engaging in speculative takings. Condemnors cannot benefit financially from a taking by selling the property to the highest bidder or benefit from any market appreciation if they chose not to put the property to a public use, as the condemnee will have the first right to regain title.

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215. By nature, the period of time that is reasonable will vary from one context to the next. For example, if a condemnor claims during the condemnation proceedings that construction will begin on the project within a year, if more than a year has passed, it may be more than a reasonable period of time. Conversely, if a condemnor condemns property and admits construction will not begin for two to three years, then the previous owner would arguably have to wait until three years has passed before bringing a suit challenging the reasonableness of the period that has lapsed with no corresponding public use.

216. *See* Cooney, *supra* note 214, at 768–69. Kentucky currently has this type of statute in force. The statute states,

> Development shall be started on any property which has been acquired through condemnation within a period of eight (8) years from the date of the deed to the condemnor or the date on which the condemnor took possession, whichever is earlier, for the purpose for which it was condemned. The failure of the condemnor to so begin development shall entitle the current landowner to repurchase the property at the price the condemnor paid to the landowner for the property. The current owner of the land from which the condemned land was taken may reacquire the land as aforementioned.

Id.; KY. REV. STAT. ANN. § 416.670(1) (LexisNexis 2005).

217. Cooney, *supra* note 214, at 768.

2. Repurchase at Current Market Value

A second option is to allow property owners to purchase the property at the current market value.[218] Although this type of statute is better than providing no rights at all to the condemnee, as Washington currently does, this approach has severe shortcomings. For example, if the property value has increased at all, the previous owner may be economically unable to repurchase the property.[219] Moreover, this approach allows the condemnor to benefit from the taking, even if the condemnor must transfer title back to the condemnee; if they are allowed to retain the difference between the original condemnation price and the subsequent sale price, condemnors will still have an incentive to engage in fraudulent and speculative takings.[220] Thus, even though this option is better than providing no rights at all for the condemnee to collaterally attack the condemnation, this option is inferior to the right of the condemnee to repurchase the property at the original condemnation price.

VI. CONCLUSION

The public use requirement is an integral part of takings jurisprudence under both the Fifth Amendment and article I, § 16 of the Washington constitution. The public use requirement should serve as a protection for property owners against arbitrary and speculative governmental interference with property rights. However, courts have expanded public use beyond its original meaning, thereby providing less protection than should be provided to property owners. Additionally, Washington courts defer to legislative determinations as to the amount of property necessary to complete a project, as well as the interest necessary. This deference creates an additional barrier for property owners in protecting their homes from condemnors.

As if these issues were not enough, private property rights are also at risk when condemnors exercise eminent domain only to abandon the public use of the property after condemnation, or worse, fail to ever fulfill a public use at all. Allowing condemnors to abandon the public use of the property without providing corresponding rights to condemnees to protect themselves is inconsistent with the public use requirement, as it essentially leads to takings for private purposes. The public use require-

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218. Cooney, *supra* note 214, at 766. Montana currently has this kind of statute in force. The statute states in part, "[W]henever a person who has acquired a real property interest for a public use, whether by right of eminent domain or otherwise, abandons the public use and places the property interest for sale, the seller may sell the interest to the highest bidder at public auction." MONT. CODE ANN. § 70-30-321(1) (2005).

219. *See* Cooney, *supra* note 214, at 768.

220. *See* Cooney, *supra* note 214, at 751, 768.

ment is an integral part of both the U.S. and Washington constitutions' eminent domain sections, and courts have too greatly expanded the reach of those sections without giving condemnees any way to protect themselves and their property.

To solve the inequity that results from the condemnor's public use abandonment, a number of changes should occur. First, courts should stop presuming that condemnors act in good faith in bringing condemnation proceedings. Given the number of cases in which condemnors abandoned the public use, such a presumption is no longer warranted.

Second, courts should make the determination of which property and what type of interest is necessary to complete a project, rather than deferring to legislative pronouncements. Washington courts should independently determine whether a project constitutes a public use and also require proof of necessity from the condemnor.

Third, condemnors should be required to use the condemned property for a public use within a reasonable period of time and for a specified period. Imposing a time limit prevents the condemnor from delaying use of the property until it appreciates so that it may sell the property to the highest bidder. Eliminating this ability ensures that condemnors only condemn property that is really needed for public projects. Similarly, condemnors should also be required to use the property for a public use for a specified period. This period could range anywhere from five to twenty years. This would prevents condemnors from engaging in speculative takings, as the condemnor is forced to put the property to a public use.

If the condemnor fails to satisfy any of these conditions, the condemnee should have the right to repurchase the property at the original condemnation price. This allows the condemnee to "undo" the taking by regaining title and returning any compensation received for the property. By giving condemnees this right, the legislature levels the playing field between condemnors and condemnees. Condemnors have an incentive to exercise eminent domain *only* when the property is actually needed for a public project, and if the project does not occur, the condemnor may lose the property. Similarly, condemnees have the ability to protect themselves from fraudulent or speculative takings by having the right to regain title, if they choose to do so, if the public use is abandoned.

Today's courts are more likely to approve of exercises of eminent domain that would not have withstood the scrutiny of early twentieth century courts. It is therefore imperative that courts, as well as the legislature, ensure that private property owners are protected from condemnors who take advantage of their power and use eminent domain for improper and unfair purposes. Eminent domain is an inherent power of

government, but government must do what it can to ensure that private property rights are secure.